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IN THE

Supreme Court of the United States

AKOS SWIERKIEWICZ,

Petitioner,

v.

SOREMA, N.A.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF *AMICUS CURIAE* CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Center for Individual Freedom ("the Center") is a non-profit organization with the mission to protect and defend individual freedoms and individual rights guaranteed by the United States Constitution, including, but not limited to, due process rights, free speech rights, property rights, privacy rights, freedom of association, and religious freedom. Of par-

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

ticular importance to the Center in this case is constitutional protection for "individual" due process under the law, whether that individual be a person or corporate entity. The Center believes that reduction of frivolous claims through the conscientious and consistent enforcement of the pleading requirements of the Federal Rules of Civil Procedure is a vital step toward protecting such due process.

SUMMARY OF ARGUMENT

Employment discrimination actions brought under the federal anti-discrimination statutes (*e.g.*, Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), and the Age Discrimination in Employment Act ("ADEA")) are subject to the notice pleading requirements of the Federal Rules of Civil Procedure (the "Rules"). Petitioner's interpretation of "notice pleading," however, fails to give the type of notice contemplated by the Rules or the case law interpreting them. Petitioner argues that a discrimination plaintiff need only aver that "an employee was fired because of his national origin and age . . . to overcome a defense motion to dismiss." (Petitioner's Brief, p. 16.) Such a conclusory allegation fails to provide a defendant with "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Rather, it provides the defendant with little, if anything, more than notice that he or she is being sued.

Moreover, should such a conclusory allegation suffice to overcome a defense motion to dismiss, Rule 12(b)(6) is rendered a nullity in the employment context, something this Court has never previously held or even suggested. As a result, Petitioner really is asking this Court to adopt a new, relaxed pleading, indeed a "non-pleading" standard in employment discrimination lawsuits. Nothing about discrimination cases or discrimination plaintiffs warrants such a special exception. Due to the Equal Employment Opportunity Commission ("EEOC") charge filing and investigative processes,

and the rights accorded plaintiffs under the Freedom of Information Act ("FOIA"), discrimination plaintiffs are among the most informed of civil litigants at the pleading stage and are in the best position to plead at least some facts in support of their claims. Likewise, discrimination defendants, having already been through the investigative process, have a compelling due process right to have meritless claims dismissed at the pleading stage.

The Second Circuit did not employ a "heightened" pleading requirement in affirming the district court's grant of Respondent's motion to dismiss Petitioner's discriminatory termination claims. Rather, the Second Circuit required compliance with the Rule 8 mandate to show that the claimant is "entitled to relief." Petitioner failed to do so and his Complaint properly was dismissed.

ARGUMENT

I. PETITIONER'S CONCEPT OF NOTICE PLEADING RENDERS RULE 12(b)(6) A NULLITY AND MISINTERPRETS THIS COURT'S PRIOR RULINGS.

Rule 1 sets forth the "Scope and Purpose of the Rules" and mandates that "[the Rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." This broad pronouncement, which provides the backdrop for the construction of the Rules, is applicable to plaintiffs *and* defendants, petitioners *and* respondents, alike. It exemplifies this Court's focus on striking a balance between the fair adjudication of claims and the avoidance of undue cost or delay in doing so.[2] Rules 8 and 12

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[2] *See* Advisory Committee Notes regarding 1993 amendments to Rule 1 ("The purpose of this revision, adding the words 'and administered' to the second sentence, is to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay. As officers

effectuate that balance at the pleading stage of litigation by providing minimum pleading requirements and the method and means to attack deficient pleadings, respectively. Rule 8(a) states, in relevant part:

> A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . . (2) a short and plain statement of the claim *showing that the pleader is entitled to relief*, and (3) a demand for judgment for the relief the pleader seeks. (Emphasis added.)

Rule 12(b) provides, in relevant part, that a party may bring a motion to dismiss for "(6) failure to state *a claim upon which relief can be granted* . . . . A motion making any of these defenses shall be made *before* pleading if a further pleading is permitted." (Emphasis added.)

Petitioner's argument that a plaintiff in the employment discrimination context need not allege *any* facts and yet may still satisfy the pleading requirements of Rule 8(a) renders Rule 12(b)(6) a nullity. Moreover, it is inconsistent with Rule 8(b) and Rule 11 – which also presuppose the pleading of some *factual* allegations.[3]

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of the court, attorneys share this responsibility with the judge to whom the case is assigned.")

[3] Rule 8(b) requires that "[a] party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial." Rule 11(b)(3) requires attorneys and parties to certify that "the allegations *and other factual contentions* have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." (Emphasis added.) Rule 11(b)(4) requires attorneys and parties to certify that "the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on lack of information or belief."

A. Basic Statutory Construction Requires That Rules 8(a) And 12(b)(6) Be Read So As To Make Each Enforceable.

"It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, ___ U.S. ___, 122 S. Ct. 441, 449 (2001) (citations omitted). This Court repeatedly has reaffirmed that "'[i]t is our duty "to give effect, if possible, to every clause and word of a statute."'" *Duncan v. Walker*, 533 U.S. 167, ___, 121 S. Ct. 2120, 2125 (2001) (citing *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)). Indeed, the Court is "'reluctant to treat statutory terms as surplusage' in any setting." *Duncan*, 533 U.S. at ___, 121 S. Ct. at 2125 (citation omitted). The same is true for each of the Federal Rules of Civil Procedure promulgated by this Court. To fulfill the overall purpose of the Rules -- the just, speedy, and inexpensive determination of every action -- each Rule should be read so as to give it full effect.

B. Petitioner's And *Amici*'s Interpretation Of Rule 8 Renders Rule 12(b)(6) A Nullity In The Employment Discrimination Context.

Reduced to its essence, Petitioner and *Amici* argue that Rule 12(b)(6) does not apply to discrimination lawsuits. If a discrimination plaintiff satisfies the pleading requirements of Rule 8(a) simply by alleging that (1) he is in a protected group; and (2) a conclusory allegation that he was subjected to discrimination, it is difficult, if not impossible, to conjure a discrimination complaint that could be dismissed for failure to state a claim upon which relief can be granted under Rule 12(b)(6). Should this Court adopt such a relaxed standard – one in which no facts, only conclusory allegations, need be pled to satisfy Rule 8(a) – it is actually holding that Rule 12(b)(6) does not apply to discrimination cases. Such a result is unwarranted.

In order for a Rule 12(b)(6) motion to be granted, the moving party must establish that the plaintiff has failed to state a claim for which relief can be granted. A "claim" is nothing more than the sum of its elements. Thus, a moving party must show that the plaintiff has not alleged one or more elements of the claim (*i.e.*, prongs of the *prima facie* case) and, therefore, did not, as a matter of law, state a claim. The analysis has nothing whatsoever to do with determining whether a plaintiff has evidence to support the allegations in the complaint, weighing the evidence, assessing plaintiff's likelihood of ultimately prevailing at summary judgment or trial, or deciding whether plaintiff has set forth a complete and convincing picture of the alleged wrongdoing. Rather, Rule 12(b)(6) serves as the gatekeeper that determines whether a plaintiff will be allowed to offer evidence in support of his complaint. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) ("The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.") It is an issue of pleading, not of proof. However, it requires the pleading of at least some facts. Otherwise, there is nothing for a court to examine under Rule 12(b)(6). If a claim could be stated by offering nothing more than "I am in the protected group and I suffered an adverse job action because of discrimination," no court could analyze the complaint to determine whether it states a claim. This Court has not set such a low threshold for pleading. Even in the context of discrimination cases, this Court has held that Rule 12(b)(6) requires that facts, not just conclusory allegations, be pled.

C. Petitioner Misinterprets This Court's Prior Ruling In *Conley* In Arguing That Discrimination Plaintiffs Need Not Plead Facts.

In support of their position, Petitioner and *Amici* improperly rely upon this Court's decision in *Conley v. Gibson*, 355 U.S. 41 (1957), for the proposition that a plaintiff in an em-

ployment discrimination action need not plead facts in support of his or her claim.[4] In making such an argument, Petitioner relies upon quotations from the *Conley* decision – divorced from the factual context in which they were made – and ignores key language in the Court's opinion. Indeed, the *Conley* Court neither mandated that Rule 12(b)(6) was inapplicable in the employment discrimination context nor that a plaintiff need not set forth any facts in support of his or her claim of employment discrimination.

In *Conley*, African-American members of the Brotherhood of Railway and Steamship Clerks brought a class action against the Brotherhood, and its Local Union No. 28, alleging breach of the duty of fair representation of all Union members without regard to race. *Id.* at 42. Defendants moved to dismiss the complaint on a number of grounds, including lack of jurisdiction, failure to join an indispensable party, and failure to state a claim upon which relief could be given. *Id.* at 43. The District Court granted defendants' motion on the ground that Congress had given the Railroad Adjustment Board exclusive jurisdiction over the controversy. *Id.* at 43-44. The Fifth Circuit Court of Appeals affirmed, relying on the same ground. *Id.* at 44. This Court granted *certiorari* and held that it was error for the lower courts to dismiss the complaint for lack of jurisdiction. *Id.* Although the District Court did not rule on the other grounds advanced by defendants in their motion to dismiss, this Court considered and ruled upon their merits. *Id.* at 45.

In adjudicating respondent's argument that the complaint failed to set forth a claim upon which relief could be granted, this Court analyzed the sufficiency of the allegations alleged by petitioners. These factual allegations included the following: (1) "In May 1954, the Railroad purported to abolish 45

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[4] "[A] complaint averring that an employee was fired because of his national origin and age . . . must also be sufficient to overcome a defense motion to dismiss." (Petitioner's Brief, p. 16.)

jobs held by petitioners or other Negroes all of whom were either discharged or demoted"; (2) "In truth the 45 jobs were not abolished at all but instead filled by whites as the Negroes were ousted, except for a few instances where Negroes were rehired to fill their old jobs but with loss of seniority"; (3) "Despite repeated pleas by petitioners, the Union, acting according to plan, did nothing to protect them against these discriminatory discharges and refused to give them protection comparable to that given white employees"; and (4) "[T]he Union had failed in general to represent Negro employees equally and in good faith" in violation of the Railway Labor Act. *Id.* at 43. The Court held that, if proven, the complaint's allegations would constitute "a manifest breach of the Union's statutory duty to represent fairly and without hostile discrimination all of the employees in the bargaining unit." *Id.* at 46.

Addressing respondent's argument that the complaint failed to set forth sufficient facts, the Court responded:

> [T]he Federal Rules of Civil Procedure do not require a claimant to set out *in detail* the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's *claim is and the grounds upon which it rests*.

Id. at 47 (emphasis added) (footnote omitted). The Court further explained that it had "no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis." *Id.* at 48.

The Supreme Court used the *Conley* decision to explain what is and is not required to survive a motion to dismiss under the notice pleading standard adopted by the Federal Rules. Far from holding that a discrimination plaintiff need not plead any facts in support of his claim, *Conley* stated that the "Federal Rules of Civil Procedure do not require a claimant to set out *in detail* the facts upon which he bases his claim. " *Id.* at

47 (emphasis added). In other words, the Court ensured that petitioners had, at a minimum, alleged the requisite facts so as to state a claim for relief should the evidence support them, but it was not going to require petitioners to plead every fact possible in support of their claims at that early stage of the litigation. This balance effectuates Rule 8(f)'s mandate that "[a]ll pleadings shall be so construed as to do substantial justice," especially in light of the numerous factual allegations pled by petitioners in support of their claim. The *Conley* Court did not face, nor did it adjudicate, a scenario in which a plaintiff sets forth *no facts* to support his claim of discrimination. Moreover, the Court gave no indication that a plaintiff would survive a motion to dismiss and be afforded the opportunity to offer evidence in support of his claims in such a scenario.

Petitioner and *Amici* start with the incorrect presumption that notice pleading means that a plaintiff need not allege any facts in support of his claims; it satisfies the pleading requirements to simply put a defendant on notice that he is being sued. They then purport to place the imprimatur of the Supreme Court upon that faulty presumption by citing *Conley* as affirming their position. To do so, they divorce *Conley* from its factual context (particularly that the *Conley* petitioners set forth enough facts to state a *prima facie* case) and ignore the "in detail" portion of the quotation addressing what facts must be alleged. Indeed, the circuit court decisions relied upon by Petitioner for the proposition that a plaintiff can satisfy Rule 8(a) and survive a motion to dismiss without pleading facts in support of his claim (Petitioner's Brief, pp. 18-19), rely on this faulty analysis of the *Conley* decision and/or involve factual allegations sufficient to state the elements of the claims asserted.[5]

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[5] *See Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1114-16 (D.C. Cir. 2000) (misconstruing the *Conley* language, while relying on the *McDonnell Douglas* framework to conclude that Plaintiff had adequate facts sup-

Recently, this Court, in affirming a lower court's grant of a motion to dismiss under Rule 12(b)(6), analyzed the elements of the underlying discrimination claim and determined whether the plaintiff sufficiently alleged those elements in the complaint. In *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), this Court had to decide whether petitioners, who were plaintiffs in a disability discrimination action, had failed to state a claim under Rule 12(b)(6). Petitioners had applied for positions as commercial airline pilots with United Air Lines. They alleged that they had severe myopia, but that "'with the use of corrective lenses, each . . . has vision that is 20/20 or better.'" *Id.* at 475 (citation omitted). Petitioners went on to allege that "without corrective lenses, each 'effec-

porting his claims for relief); *Weston v. Pennsylvania*, 251 F.3d 420, 427-28 (3d Cir. 2001) (misconstruing *Conley* language while specifically requiring the pleading of facts: "Weston's complaint indicates that he was subjected to comments, jokes, and jibes by unspecified inmates. Complaint at P. 18. Absent further amplification—for instance that prison officials encouraged the inmate's comments, or that prison officials knew of the harassing conduct but failed to remedy it—this mere allegation is insufficient to state a Title VII claim."); *Bennett v. Schmidt*, 153 F.3d 516, 517-19 (7th Cir. 1998) (improperly relying on *Conley* while confusing the concept of "proof" with "allegations," but nonetheless emphasizing that plaintiff had set out the elements of the discrimination claim); *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924, 927-28 (8th Cir. 1993) (relying on language from *Conley* decision divorced from factual context of the case; rejecting the prima facie case as a basis for Rule 12 analysis, but utilizing the statutory elements of the Fair Housing Act to determine whether plaintiff's complaint allegations could survive a motion to dismiss); *Ortez v. Washington County*, 88 F.3d 804, 808 (9th Cir. 1996) (plaintiff set forth numerous factual allegations in support of his discrimination claim, including that (1) he was required to comply with different terms and conditions of employment than were required of his non-Mexican-American co-workers; (2) defendants failed to inform him of a new system of recording housing inspections; (3) defendants required him to satisfy conditions not required of non-Mexican-American employees in order to return to work following a medical leave; (4) defendants imposed performance standards upon him that were not imposed on non-Mexican-American employees; and (5) he was replaced by a less qualified and less experienced non-Mexican-American employee after his termination).

tively cannot see to conduct numerous activities such as driving a vehicle, watching television or shopping in public stores,' . . . but with corrective measures, such as glasses or contact lenses, both 'function identically to individuals without a similar impairment.'" *Id.* (citations omitted). Due to petitioners' failure to meet United Air Lines' minimum vision requirement (uncorrected visual acuity of 20/100 or better), their interviews were terminated, and neither was offered a pilot position. *Id.* at 475-76. Petitioners filed an administrative charge with the EEOC alleging that United Air Lines had discriminated against them "'on the basis of their disability, or because [respondent] regarded [petitioners] as having a disability'" in violation of the Americans with Disabilities Act ("ADA"). *Id.* at 476.

The District Court dismissed petitioners' complaint for failure to state a claim upon which relief could be granted on two grounds: (1) because petitioners could fully correct their visual impairments, the court held that they were not actually substantially limited in any major life activity and thus had not stated a claim that they were disabled within the meaning of the ADA; and (2) petitioners had not made allegations sufficient to support their claim that they were "regarded" by respondent as having an impairment that substantially limits a major life activity. *Id.* The Court of Appeals for the Tenth Circuit affirmed the District Court's judgment. *Id.* at 477.

In analyzing whether petitioners' disability discrimination action properly had been dismissed for failure to state a claim upon which relief could be granted under Rule 12(b)(6), this Court began its analysis by turning to the language of the ADA itself, which sets forth the elements of a claim for disability discrimination.[6] As to petitioners' claim that they

[6] As the Court noted, "[t]he ADA prohibits discrimination by covered entities, including private employers, against qualified individuals with a disability." *Id.* at 477. The ADA defines "disability" as: "(A) a physical or mental impairment that substantially limits one or more of the major

were "regarded as" disabled by United Air Lines, this Court affirmed the lower courts' grant of the motion to dismiss "[b]ecause petitioners have not alleged, and cannot demonstrate, that respondent's vision requirement reflects a belief that petitioners' vision substantially limits them." *Id.* at 494.[7] The conclusory allegation that *petitioners* believed that United Air Lines regarded them as being disabled did not entitle them to conduct discovery because they pled no facts from which such an inference could be drawn.

The Court's analysis in *Sutton* teaches two very important lessons. First, it is logical and appropriate to analyze a motion to dismiss under Rule 12(b)(6) by examining the elements that make up the claim and determining whether a plaintiff has sufficiently alleged those elements in the complaint. Second, a discrimination plaintiff must plead more than the conclusory allegation "I was [subjected to an adverse employment action] because of [protected status]." Indeed, the petitioners in *Sutton* were required to allege facts in support of each of the elements of a disability discrimination claim. To wit, they were required to allege not only that they believed that the employment action was motivated by discriminatory animus, but also the facts showing that they were substantially limited in a major life activity and/or the facts showing that they were regarded as being so limited. Since they were unable to do so, their complaint properly was dismissed under Rule 12(b)(6). According to Petitioner, requir-

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life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

[7] Specifically, this Court noted that "petitioners have failed to allege adequately that their poor eyesight is regarded as an impairment that substantially limits them in the major life activity of working. They allege only that respondent regards their poor vision as precluding them from holding positions as a 'global airline pilot.' . . . Because the position of global airline pilot is a single job, this allegation does not support the claim that respondent regards petitioners as having a *substantially limiting* impairment." *Id.* at 492-93 (internal citation omitted; emphasis in original).

ing such a showing at the pleading stage constitutes a "heightened pleading requirement." (Petitioner's Brief, pp. 20-23.) It does not. Petitioner's concept of notice pleading runs directly counter to this Court's analysis and holding in *Sutton*.

Petitioner similarly misconstrues the import of the Federal Forms in arguing that notice pleading dispenses with the need for facts. According to Petitioner, Federal Form 9 requires nothing more than a pleading of negligence to state a claim. (Petitioner's Brief, p. 16.) However, the Forms themselves belie this statement. Form 9 specifically alleges the date of the accident, that the accident took place on a public highway, that the plaintiff was a pedestrian on said highway, that plaintiff was hit by a motor vehicle driven by defendant, and thereby injured. While the complaint does not specifically allege that there was a duty of care from the defendant toward the plaintiff, the fact that plaintiff was walking and defendant was driving on a public highway are facts from which a duty of care from defendant toward plaintiff can be inferred. Similarly, while plaintiff does not specifically allege how the defendant was negligent and only states generally that the defendant was "negligent," the fact that defendant, while driving, struck plaintiff, while walking on a public highway, are facts from which negligence can be inferred. Therefore, the conclusory allegation that defendant "negligently drove" his car is a conclusion that can be logically reached from the facts pled in the complaint.

Thus, while a conclusory allegation can be sufficient to allege negligence, it is not sufficient if the complaint is devoid of *facts* upon which that conclusory allegation can be justified. Not every fact need be pled, nor must every defense be vitiated (*e.g.*, plaintiff was not required to plead that he was walking safely, or in a crosswalk), but some facts from which, absent rebuttal, a claim could be made, had to be alleged.

Keeping in mind this basic premise derived from *Conley*, *Sutton*, and the Federal Forms – that the complaint must con-

tain at least enough facts from which a claim can be inferred, it is then possible to see how Petitioner, and *Amici* in support of Petitioner, have mixed the concepts of pleading and proof, summary judgment and Rule 12(b)(6), to try to create the impression that no facts should be required of Title VII or ADEA plaintiffs at the pleading stage. First, unlike the ADA, Title VII prohibits intentional discrimination but does not define "intentional discrimination." Therefore, the case law has, over time, defined various ways in which it can be shown (*e.g.* by direct evidence, by the disparate impact of a policy or practice on a protected group, and by indirect or circumstantial evidence from which discrimination can be inferred). *See U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Obviously, the easiest way for a plaintiff to state a case of intentional discrimination is to show the circumstantial facts from which the law allows an inference of discrimination to be drawn. One formulation of the circumstantial *prima facie* case is set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and subsequent cases. While the *McDonnell Douglas* standard is not the *only* framework within which a plaintiff can state a discrimination claim, plaintiffs generally rely on it because it is so easy to satisfy. Lacking any direct evidence of discrimination, a plaintiff can still state a claim merely by alleging that (1) he is in a protected class; (2) he suffered an adverse job action; (3) he was performing satisfactorily; and (4) others, not in the protected class, were treated more favorably.[8]

In repeatedly reaffirming the use of the *McDonnell Douglas* test, courts have made comments, such as those quoted in the briefs for Petitioner and his *Amici*, that discrimination

[8] This phraseology of the test changes depending on the nature of the claim (*e.g.*, in a discriminatory hiring claim it might be phrased that plaintiff was not hired and a less qualified individual, not in the protected class, was hired).

plaintiffs do not have access to all of the facts, or that discrimination is often subtle and unstated and that plaintiffs frequently will lack direct evidence. However, Petitioner greatly misconstrues and overstates these observations in concluding that they imply that a Title VII or ADEA plaintiff need not plead *any* facts. Rather, these statements justify allowing a Title VII or ADEA plaintiff to stay in court in situations where he lacks any direct or specific facts that prove discrimination and uses only facts that circumstantially may legally imply discrimination.[9] These cases do not hold, nor should they be construed to hold, that a Title VII or ADEA plaintiff who pleads *no facts* from which discrimination can even be inferred should retain his right to remain in court.

Petitioner argues that because he does not have to prove a *prima facie* case at the pleading stage, he therefore does not even have to allege one. (Petitioner's Brief, p. 18.) That is incorrect. Informing a defendant that he is being sued for discrimination is not sufficient. Rule 8(a) requires that there be a claim "showing that the pleader is entitled to relief." That "claim" may be composed of facts, which if proven, would create a *McDonnell Douglas* inference of discrimination, or may show a disparate impact on a protected group, or Petitioner may want to argue some other standard by which facts sufficient to state a Title VII or ADEA claim may be judged. However, the claim must arise out of facts. It cannot arise out of nothing more than conclusory allegations, nor can it arise

[9] *See, e.g., Oxman v. WLS-TV*, 846 F.2d 448, 453 (7th Cir. 1988) (relied on by *Amicus* Lawyers' Committee for Civil Rights Under Law which reversed the granting of a motion for summary judgment but observed: "when a plaintiff cannot make out a *prima facie* case, the employer can avoid unnecessary litigation expense by filing a motion to dismiss. . . ."); *Smith v. Borough of Wilkinburg*, 147 F.3d 272, 278 (3d Cir. 1998) (held that it was reversible error not to instruct the jury that they could, but did not have to, find for plaintiff if they found that plaintiff had proven a *prima facie* case and that defendant's explanation for the termination was not believed) (cases cited in *Amicus* Brief of Lawyers' Committee for Civil Rights Under Law, pp. 14-15).

out of facts which, even if proven, still do not create an inference of discrimination. To hold to the contrary renders Rule 12(b)(6) a nullity.

II. THERE IS NOTHING UNIQUE ABOUT TITLE VII AND ADEA PLAINTIFFS THAT SHOULD EXEMPT THEIR CLAIMS FROM RULE 12(b)(6) ANALYSIS.

Ironically, Petitioner argues that a Title VII or ADEA plaintiff should not have to allege facts in support of his complaint because defendants are already on notice as to the claims through the EEOC charge filing and investigation process. (Petitioner's Brief, pp. 16-17.) In fact, this results in exactly the opposite conclusion. Prior to filing a lawsuit under Title VII or the ADEA, a plaintiff must exhaust his or her administrative remedies by filing a charge of discrimination with the EEOC. *See* 42 U.S.C. § 2000e-5(b) (Title VII) and 29 U.S.C. § 626(d) (ADEA). The EEOC requires that the administrative charge contain "[a] clear and concise statement of the *facts*, including pertinent dates, constituting the alleged unlawful employment practices." 29 C.F.R. § 1601.12(a)(3) (Title VII) (emphasis added); 29 C.F.R. 1626.8(a)(3) (same as to ADEA). Title VII also requires that "[c]harges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." 42 U.S.C. § 2000e-5(b). As such, all plaintiffs alleging employment discrimination under Title VII or the ADEA have already been required to plead specific facts supporting their discrimination claims during the EEOC charge process.

Based upon the factual allegations made in the administrative charge and the accompanying affidavit of the charging party, the EEOC is empowered to conduct an investigation. To aid in the determination of whether the EEOC has "reasonable cause" to believe that there has a been a violation of the anti-discrimination statute, the agency, in connection with the investigation of a charge "shall at all reasonable times

have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices . . . and is relevant to the charge under investigation." 42 U.S.C. § 2000e-8(a). This investigation could include a demand for documents (including personnel files, hiring and termination data, and statistical information), interviews of witnesses and decisionmakers, and visits to the site of the alleged discrimination. At the conclusion of the investigation, the EEOC will make a determination as to whether there is reasonable cause to believe that there was a violation of the particular anti-discrimination statute (*e.g.*, Title VII, ADEA, ADA, Equal Pay Act). *See* 42 U.S.C. § 2000e-5(b).

Regardless of the outcome, upon conclusion of the EEOC investigation, a charging party simply can make a written request, pursuant to the Freedom of Information Act ("FOIA"), for a copy of the EEOC file compiled during the investigation of his or her charge. 5 U.S.C. § 552. Although Title VII requires the EEOC to maintain the confidentiality of its investigation in general (*see* 42 U.S.C. § 2000e-8(e)), there is a significant exception. This Court has held that Section 2000e-8(e) does not prohibit the EEOC from disclosing information obtained in an investigation to a charging party.[10] *See EEOC*

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[10] Section 552(b)(6) of the FOIA exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." This exemption, however, is not a blanket exemption for personnel files. Rather, in evaluating whether a request for information lies within the scope of the exemption, the court must balance the extent to which disclosure would serve FOIA's core purpose of contributing significantly to public understanding of the government's operations or activities against the individual's right to privacy. *See U.S. Dep't of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487, 495-96, 502 (1994) (federal agencies not required by FOIA to divulge addresses of employees to Union because employee's interest in non-disclosure outweighs negligible FOIA-related public interest in disclosure); *Dep't of Air Force v. Rose*, 425 U.S. 352, 371-72 (1976) (holding that Section 522(b)(6) does not create a "blanket exemption" for per-

v. Associated Dry Goods Corp., 449 U.S. 590, 598 (1981) (reversing district court's protective order barring disclosure to charging party of information in his own file); *see also* 29 C.F.R. § 1601.22; *EEOC v. Aon Consulting, Inc.*, 149 F. Supp. 2d 601, 603 (S.D. Ind. 2001) (The EEOC may "share the results of its investigation with complaining parties, who are under no legal obligation to maintain confidentiality."). Moreover, although the EEOC requires charging parties to sign nondisclosure agreements before they gain access to information that the EEOC obtained in an investigation, the nondisclosure agreement allows the charging party to disclose information through a lawsuit. *See EEOC v. Associated Dry Goods Corp.*, 449 U.S. at 596-98 & n.12 (citing EEOC Compliance Manual § 83.3).[11]

At the end of the day, then, the argument that discrimination plaintiffs would be barred from bringing potentially meritorious discrimination lawsuits by having to plead some facts in support of their claims rings hollow, as does the argument that plaintiffs are simply unaware, at the time they file their complaint, of the facts upon which they may base a claim for relief. Indeed, due to the EEOC exhaustion requirement and investigative process, discrimination plaintiffs are in perhaps the best position to comply with Rule 8(a) and set forth at least minimal facts in support of their claims.

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sonnel files; "Congress also made clear that nonconfidential matter was not to be insulated from disclosure merely because it was stored by an agency in its 'personnel' files. Rather, Congress sought to construct an exemption that would require a balancing of the individual's right of privacy against the preservation of the basic purpose of the [FOIA] .... The device adopted to achieve that balance was the limited exemption, where privacy was threatened, for 'clearly unwarranted' invasions of personal privacy.")

[11] In any event, as has been noted by the courts, "[t]here is no indication, however, that such agreements have effective enforcement mechanisms where a charging party violates the agreement." *EEOC v. Aon Consulting, Inc.*, 149 F. Supp. 2d at 605.

Furthermore, undercutting a court's ability to scrutinize a Title VII or ADEA claim under Rule 12(b)(6), by eliminating the need for facts to be pled, runs counter to the public policy exemplified in Title VII and the ADEA for a prompt investigation and resolution of claims. *See* 42 U.S.C. § 2000e(5); 29 U.S.C. § 626. Since charging parties are required to state facts to the EEOC, the pleading standard urged by Petitioner would make it easier for alleged victims to sue than to get their charges investigated and resolved by the EEOC. While such a standard would clearly benefit plaintiffs' lawyers, it does nothing to further the goals of promptly investigating and remedying discrimination in employment.

III. THE FEDERAL RULES SHOULD BE CONSTRUED WITH AMPLE REGARD FOR THE DUE PROCESS CONCERNS RAISED BY IMPOSING LITIGATION COSTS ON DEFENDANTS WITHOUT ADEQUATE PLEADING OF A VALID CLAIM.

Petitioner's argument that all defendants sued for employment discrimination must weather discovery and pursue a motion for summary judgment to extricate themselves from litigation – even where plaintiffs have pled *no* facts to support their claims – implicates fundamental due process concerns by allowing plaintiffs to use government authority to impose tremendous costs on defendants where there is no reasonable basis to believe that wrongdoing has occurred. (Petitioner's Brief, pp. 20-23.) It is impossible to justify subjecting discrimination defendants to months of litigation[12] – which ex-

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[12] During the 12-month period from October 1, 1999 through September 30, 2000, 179,360 civil cases terminated (either without court action or as a result of some action by the court). *See Annual Report of the Director (2000)*, Washington D.C.: Administrative Office of the United States Courts (Table C-5). For the 32,350 civil cases that terminated without court action, the median time interval from filing to disposition was 7.9 months. *Id.* During that same 12-month period, a total of 47,010

acts not only a hefty monetary toll, but also a significant human and emotional toll – when adequate due process at the pleadings stage, as contemplated and required by the Federal Rules, could allow a prompt determination on a motion to dismiss that the complaint failed to state a claim upon which relief could be granted.

According to Petitioner, the bald, conclusory allegation that "I was fired because of my national origin" (*see* Petitioner's Brief, p. 16), is all a plaintiff must plead to force a defendant to incur months and months of attorneys' fees and costs. This unwarranted financial outlay includes costly discovery (including, at a minimum, propounding and responding to document demands and taking and defending depositions), communications with opposing counsel, court appearances, and preparation and adjudication of a motion for summary judgment. Absent the availability of a Rule 12 motion to dismiss for failure to state a claim upon which relief can be granted, defendants (which include individuals, who can be held personally liable) are guaranteed to expend literally thousands of dollars regardless of the merits of the action or its eventual outcome.[13] Many defendants, thus, make an eco-

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civil cases terminated as a result of court action. The median time interval from filing to disposition of the (1) 122,508 civil cases that terminated due to court action taken before pre-trial proceedings commenced was 7.8 months; (2) 19,474 civil cases that terminated due to court action during or after pre-trial proceedings was 13.6 months; and (3) 5,028 civil cases that terminated as a result of trial was 20.1 months. *Id.*

[13] Defendants who ultimately prevail in the action via a motion for summary judgment or other means stand very little chance of recovering their attorneys' fees as a "prevailing party" under 42 U.S.C. § 2000e-5(k). Indeed, this Court has distinguished between recovery standards for prevailing Title VII plaintiffs and prevailing Title VII defendants. "[A] prevailing *plaintiff* ordinarily is to be awarded attorney's fees in all but special circumstances." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 417 (1978). By contrast, a court may *not* award attorneys' fees to a prevailing Title VII defendant *unless* the "court finds that [the plaintiff's]

nomic decision that it is less expensive simply to settle the case (even if it has no merit), rather than incur the virtually guaranteed non-recoverable expense of mounting a defense. The result: a relaxed pleading standard requiring no facts encourages the bringing of baseless discrimination lawsuits with the hope that a monetary settlement based on these defense economic considerations alone can be exacted.

The only people who win in this situation are the plaintiffs and the lawyers who bring these baseless lawsuits. Defendants lose in a number of ways, including financial loss, emotional loss, and a loss in productivity from having employees tied up in litigation instead of performing their jobs. The other losers under this scenario are the courts and plaintiffs with meritorious claims. Claims without factual underpinnings pursued through discovery and summary judgment clog the courts and make it more difficult for plaintiffs with at least arguably meritorious claims, based on facts, to receive a fair, impartial hearing. No one wins when true violations of the federal anti-discrimination laws go unremedied. However, forcing defendants to spend, at a minimum, thousands of dollars to defend a meritless, factually unsupported discrimination lawsuit through discovery and summary judgment proceedings contributes nothing toward legitimate enforcement of the anti-discrimination laws, and adversely impacts the due process rights of both defendants and plaintiffs with meritorious claims. Any construction of the Federal Rules thus should be made with a keen awareness of the due process concerns that would be implicated by an overly relaxed pleadings standard allowing rank speculation and slander to substitute for good-faith factual allegations.

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claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Id.* at 422. Even under those circumstances, a defendant must expend additional time, energy and money to seek recovery of such fees, which, in the rare instances in which they are awarded, are frequently unrecoverable.

The argument offered by *Amicus* NAACP Legal Defense and Educational Fund, Inc. is that civil rights plaintiffs cannot be asked to plead facts because they will be subject to Rule 11 sanctions if they are wrong. (NAACP *Amicus* Brief, pp. 10-12.) The solution proposed is that discrimination plaintiffs should not be required to plead any facts at all. This argument is without merit and demonstrates the fundamental unfairness to defendants of Petitioner's proposed relaxed standard.

Preliminarily, the standard for Rule 11 sanctions is not that plaintiff fails to prove the facts alleged, but rather, that plaintiff had no legitimate basis for making the allegation. *See* Fed. R. Civ. P. 11(b)(3). Where a plaintiff is basing his claim on facts he does not have any reasonable basis to believe are true, he should not be able to subject a defendant to months of litigation and avoid sanctions because he was not required to specify his false assertions in his complaint.

Secondly, as noted above, both because of the EEOC processes and because of the rules allowing inferences of discrimination to be drawn from facts which do not constitute direct evidence of discrimination, plaintiffs have access to much information and a variety of ways to formulate their claims, even without knowing any specific fact that constitutes direct evidence of discrimination. The argument that plaintiffs' attorneys cannot talk to co-employees is disingenuous and misstates the cases cited. (NAACP *Amicus* Brief, pp. 8-10.) Not one case cited by *Amicus* NAACP held that rank and file employees could not be contacted. The cases pertain to lawyer contact with personnel who had the power to bind the company. Furthermore, nothing prohibits the plaintiffs themselves from discussing their issues with managerial and non-managerial personnel.

If, after all of that, plaintiff cannot state facts that he reasonably believes to be true, and that constitute the minimum

facts upon which a discrimination claim for relief can be granted, then plaintiff should not be in court.[14] The solution is not to abrogate the need to state facts; the solution is to admit that such plaintiffs do not have legitimate claims and should not be wasting the courts' time and defendants' resources. To allow plaintiffs, based on pure unreviewable speculation, to invoke the power of the courts to impose tremendous unrecoverable costs on defendants is the epitome of deprivation of property without due process of law. The Federal Rules contemplate no such thing, and should be construed accordingly.

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[14] Instructive in this regard are the charge processing statistics maintained by the EEOC. For example, during fiscal year 2000, of the 8,691 administrative charges alleging national origin discrimination resolved by the EEOC, the EEOC determined that there was no "reasonable cause" to believe that Title VII had been violated in 63.3% of the cases. *See* U.S. Equal Employment Opportunity Commission, *National Origin-Based Charges FY 1992 – FY 2000.* The EEOC found "reasonable cause" to believe a violation of Title VII had occurred in only 8.6% of the cases. *Id.* The remainder of the cases were disposed of through other means, including settlement (7.2%) and administrative closures (17.7%). *Id.*

The statistics are similar in the age discrimination context. During fiscal year 2000, of the 14,672 administrative charges alleging age discrimination resolved by the EEOC, the EEOC determined that there was no "reasonable cause" to believe that the ADEA had been violated in 58% of the cases. *See* U.S. Equal Employment Opportunity Commission, *Age Discrimination in Employment Act (ADEA) Charges FY 1992 – FY 2000.* The EEOC found "reasonable cause" to believe a violation of the ADEA had occurred in only 8.2% of the cases. *Id.* The remainder of the cases were disposed of through other means, including settlement (7.9%) and administrative closures (22.0%). *Id.* These statistics do not lead to an inference that meritorious discrimination plaintiffs are without recourse. Indeed, it would appear that a substantial number of non-meritorious claims are given the benefit of government investigation.

IV. THE SECOND CIRCUIT DID NOT REQUIRE A HEIGHTENED PLEADING STANDARD IN EVALUATING PETITIONER'S DISCRIMINATORY TERMINATION CLAIM.

Petitioner avoids focusing on what his alleged claim involves. Petitioner is suing over only one job action, his termination. JA 38a. He asserts that it was motivated by age and/or national origin discrimination.

A. Petitioner's Age Discrimination Claim Fails.

With regard to his claim for discriminatory termination on the basis of age, Petitioner alleges only that in April of 1997 he wrote a letter to Mr. Chavel, his supervisor, stating that he wanted a "severance package" to "resolve his disputes with Sorema." JA 26a (¶ 31). Although the Complaint fails to specify Mr. Chavel's age, the EEOC charge, referenced in the Complaint, sets forth that Mr. Chavel (50) is approximately the same age as Petitioner (51). JA 20a (¶ II); 21a (¶ III).

In response to this letter, Mr. Chavel and the general counsel, Daniel Schmidt, a man whose age is not alleged, gave Petitioner the choice to resign or be fired. He elected to be terminated. JA 27a (¶ 33).

Plaintiff does not allege that he was receiving poor performance reviews, that he was threatened with termination or that he had any reason to believe termination was imminent. He does not allege that he was terminated by or replaced by anyone younger. He does not allege that his letter protested age discrimination, and, indeed, has conceded that no discrimination claim can be inferred from the letter. JA 22a-30a; 34a-36a; 39a. In his EEOC charge, he alleged that the letter was prompted by his "untenable relationship" with Mr. Papadopoulo, a 33 year old co-worker. JA 20a-21a (¶ II). He does not allege that Mr. Papadopoulo had any role in the decision to terminate him. JA 22a-30a. Thus, there is not a single operative fact that indicates that, but for his letter, he would not

still be working. The Petitioner adds to this fact pattern the conclusory assertion that he was fired because of his age. However, under no stretch of the imagination can a court or jury conclude that these facts, even if proven conclusively, constitute discrimination on the basis of age. It is therefore inappropriate for Respondent to be required to defend against these allegations through discovery and summary judgment, a condition which a "no fact" pleading standard would allow.

B. Petitioner's National Origin Discrimination Claim Fails.

As to his claim that he was terminated on the basis of his national origin, Petitioner alleges that he is a United States citizen of Hungarian origin. JA 24a (¶ 12). He alleges that Mr. Chavel is a "French national" (presumably both a French citizen and of French national origin).[15] JA 24a (¶ 14). He does not allege the national origin of Mr. Schmidt. JA 22a-30a. Mr. Papadapoulo, with whom Petitioner had the untenable working relationship, is alleged to be of Greek national origin. JA 21a (¶ 1). He does not allege that he ever told anyone he was Hungarian or that Mr. Chavel, Mr. Schmidt or anyone else knew that he was Hungarian. JA 22a-30a.[16] Thus, Petitioner does not allege any facts from which an inference of termination on the basis of national origin can be inferred.

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[15] Petitioner has randomly mixed allegations of citizenship and national origin. Citizenship is not a protected class under Title VII. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973).

[16] Since Petitioner's surname is not one readily identifiable as being Hungarian in origin, there can be no inference that his Hungarian national origin was readily known.

C. Petitioner's Background Facts Cannot Save His Claims.

The issue is, can Petitioner stay in court over a termination about which he alleges no facts from which discrimination can be inferred, based on allegations of potential discrimination concerning other incidents during other time periods about which he is not suing? Certainly not.

Virtually all of the briefing has addressed the alleged wrongful demotion and the "facts" surrounding that demotion. Specifically, the complaint and all of the briefs stress that in 1995 Mr. Chavel placed Mr. Papadapoulo in the job held by Petitioner. Petitioner also alleges that Mr. Papadapoulo was less qualified than he. Petitioner worked in his new position for two years. JA 25a (¶ 19); 27a (¶ 33). It is argued that these facts are sufficient to raise an inference that Petitioner's demotion was due to age or national origin. However, Petitioner is not suing over his demotion. If he had any claim pertaining to his demotion, he failed to act on it. Under those circumstances, as this Court has recognized, the "demotion" is "merely an unfortunate event in history which has no present legal consequences." *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977).

Furthermore, according to the Complaint, two other management changes were made at the time of the alleged demotion. Mr. Peed, a younger man from the Houston office, was promoted, and Mr. Gouze, a man whose age is not alleged, was hired. JA 25a-26a (¶ 24); 26a (¶ 26). Petitioner does not allege that he quit or protested alleged discrimination at the time of his alleged demotion, that he lost pay, pay grade or title, that he was placed on any kind of job correction or criticized in any way, or that he was threatened with termination. JA 22a-30a. Petitioner stresses that at the time of his alleged demotion he was told that the department needed to be "energized" and insists that this creates an inference that age was

the reason for the demotion. Putting aside the issue of whether "energy" does or does not connote age and whether it would ever be a reasonable inference for a jury to draw, this begs the question of whether the termination, over two years later, about which there was no discussion of "energizing" anything, is surrounded by sufficient indicia of discrimination to create a viable pleading. The courts below rightfully concluded that it was not. If Petitioner proves all that he has alleged, a man Petitioner's age cannot be presumed to have terminated Petitioner's employment because of his age because, more than two years earlier, he hired and/or promoted less qualified employees, two of whom were younger and one of whom was not identified as younger.[17]

Petitioner's national origin claim is even more remote since Mr. Schmidt's and Mr. Peed's national origin are not alleged, Mr. Papadapoulo is alleged to be Greek, and there is no allegation that Mr. Chavel, or anyone else, knew that Petitioner is Hungarian. He does not allege that he was replaced by anyone of a different national origin.

Finally, Petitioner alleges that he was not terminated for cause, but other individuals of unspecified age and national origin who were terminated for cause were given a severance package. This allegation is of no significance since it pertains to other situations and to individuals who may or may not be in Petitioner's protected class(es). Petitioner does not allege that any policy, practice or activity had a disparate impact. Furthermore, Petitioner does not allege any overt discriminatory reference or statement in connection with his termination.

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[17] Courts have found it a significant fact weighing against an inference of discrimination that the decisionmaker(s) was himself a member of plaintiff's protected class. *See Adreani v. First Colonial Bankshares Corp.*, 154 F.3d 389, 398 n.5 (7th Cir. 1998); *Richter v. Hook-SupeRx, Inc.*, 142 F.3d 1024, 1032 (7th Cir. 1998).

Thus, despite the efforts of Petitioner and his *Amici* to create the impression that the courts below required a "heightened standard" or "proof" of any allegations, they did not. They did, however, hold that Petitioner must do more than allege the word "discrimination" before he is allowed to drag Respondent through months of litigation and thousands of dollars in costs in order to conclude, at the end of the day, that which was apparent from the face of the pleading: specifically, that if he successfully proves every thing he has stated, he has no claim.

CONCLUSION

For the foregoing reasons, the decision of United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted;

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